

## BACK TO BASICS ON DISPUTES

WHEN IT COMES TO EFFECTIVELY REDUCING AND MANAGING DISPUTES, THE MORE COMPLEX THE PROJECT, THE MORE IMPORTANT ATTENTION TO THE BASICS BECOMES. BY **MEAGAN BACHMAN**, PARTNER, **SQUIRE PATTON BOGGS**.

Global projects are becoming bigger and more complex than ever. Throughout the Americas and Africa, public and private entities are undertaking major highway, rail and energy projects, and airports around the world are undertaking major expansions. China has started the Belt & Road Initiative, while Europe is eyeing its own European Silk Road.

These projects all reflect ambitious visions – visions that require substantial price tags to achieve. Add in a combination of the optimism bias and strategic misrepresentation that have been shown to creep into projects of this scale, as well as the fact that bigger, more complex projects bring an expanded web of commercial and work interfaces, and it is easy to appreciate how major projects can give rise to major disputes.

However, even on large-scale projects, disputes can often be avoided altogether or contained before they become acute. This article will address several key takeaways on disputes avoidance and effective disputes management for major projects, one of which may be surprising for its simplicity: when it comes to effectively reducing and managing disputes, the more complex the project, the more important attention to the basics becomes.

What are the key basics for disputes avoidance and effective management? Parties need to:

- Acknowledge that claims on a major project are an inevitability;
- Thoughtfully identify the most likely areas of dispute and tailor the contract provisions and contractual dispute resolution scheme to address the risks posed;
- Assure thorough project documentation, including by putting in place manageable procedures and robust electronic document management systems;
- Assemble (and re-assemble as circumstances change) the right team; and
- Stay flexible when disputes do arise.

### Being realistic about claims

That claims will arise on major projects is a certainty. They are complex, challenging and often aspire to achieve ambitious goals – sometimes even to build something the world has never seen before, be it in size, quality, efficiency or function.

Each participant in a major project is dependent to a large degree on the performance of other participants and the stakes are high for every single one of them. Too many times on a major project, however, there is a lack of appreciation

and attention – particularly at an early stage when the contracts are being drafted, negotiated and executed – among the parties to a contract for the inevitability that claims will arise.

But failing to acknowledge the likelihood that claims will arise does not mean they will not. Indeed, an ostrich approach increases both the number and significance of claims as well as the likelihood that they will grow into disputes.

So, too, can optimism bias – the tendency to believe that your team or project is less likely to experience negative events – or strategic misrepresentation – the tendency to overstate benefits and understate time-scales and costs in order to get an appointment or project approved.

This is because these mindsets obscure the realities about the risks facing the project, and these risks, if not identified, addressed contractually and then properly managed, can lead to major disputes.

Being realistic about the probability of claims from the outset of a project is the first – and one of the most important – basic building blocks of avoiding their crystallising into disputes.

### Identifying likely areas of dispute

The contract provisions that need particular attention and customisation are going to vary according to the specific risks facing the project. It is worth underscoring, however, that cut-and-paste dispute resolution clauses are rarely going to meet the needs of a complex project.

For example, if the project has multiple contractors with lots of physical, time and/or contractual interfaces, then expect disputes to arise about responsibility for the impacts of one contractor's performance on another.

In such circumstances, it could be helpful to consider customising the disputes clause in the contracts to include consent to multiparty dispute resolution options so that related disputes can be resolved efficiently in one proceeding rather than multiple proceedings.

Similarly, some aspects of the project may be better served by an expedited procedure, particularly disputes that are likely to affect progress. Forming a Dispute Resolution Board (DRB) or Dispute Adjudication Board (DAB) for the project and including a robust forced work scheme in a contract might be a good choice for resolving any disputes quickly and assuring that work can progress.

There are other contractual provisions that are not part of the dispute resolution scheme but nonetheless can be geared toward heading off disputes in areas where they are likely to arise.

For example, if there is a higher likelihood of unforeseen conditions arising out of the project's interfaces with existing infrastructure or because of the prior uses of the land, it will be wise to assure that the contract language regarding both the definition of and responsibility for unforeseen conditions is very clear.

Similarly, in the event that the project will be navigating untested waters, such as the use of new technologies or employing a new market entrant, it could be useful to build in a probationary period as well as termination for convenience provisions that allow decisions about whether the situation is working to be made expeditiously.

#### **Assuring thorough project documentation**

The importance of good, thorough project documentation to reduce disputes and assure efficient resolution of the disputes that do arise cannot be overstated. When issues are clearly documented contemporaneously, it helps prevent disputes because problems are identified and engaged by the parties in real time.

More importantly, when the issues are well-documented and the documentation itself organised and managed in a state that allows it to be accessed, resolution in later proceedings is less costly because it is faster and easier for advocates, decision makers and experts – the ones billing by the hour – to quickly understand the dispute.

Conversely, poor project documentation or disorganised/poorly managed documents can increase the costs and diminish a party's ability to clearly present its case during the currency of the project when trying to resolve the dispute and later in formal dispute resolution proceedings.

While not a likely area of dispute, the project requirements for documentation are absolutely an area that the parties can and should address in the contracts themselves. Selecting procedures that are manageable to execute and setting up a robust electronic document management system go a long way to achieving the goal of having well-organised, accessible and thorough project documentation.

#### **Assembling the right team**

The same qualities of a team that keep a major construction project on time and within budget are the ones that can reduce the volume and significance of disputes.

Having the relevant experience and expertise, both generally and specific to the project, is a key factor in the successful delivery of any construction project. The right mix of experience and expertise will be highly dependent on the particular needs of the project.

By way of example, in order to achieve the requirements of its owners and users while also ultimately assuring safe and secure operations, organisations involved in designing, constructing, or commissioning an airport – or managing any of those works – must have a mix of team members

with proven experience in other airport projects, including in all of the specialist areas that are unique to airport functions such as baggage handling, special systems, signage and wayfinding, etc.

To assure proper execution of the non-specialised elements of the work, however, such organisations will also need to engage team members with a substantial depth of experience in major construction projects, even if the experience is not exclusively on airport projects. Ensuring that the team selected to execute a project has the relevant substantial experience and expertise is a key factor to reducing the likelihood that problems with delivery or disputes will arise.

On international projects, having a team with knowledge of local and international customs, norms and sensitivities is also an important part of avoiding disputes and minimising the potential impacts of differences that do arise. Understanding cultural norms and approaches among the players involved with a project reduces miscommunications and enhances effective management of issues as they manifest.

Depending on the stage of the project – and the health of the endeavour, including as diagnosed by the type and extent of disputes that have arisen – reshuffling the team can be an essential part of reducing or bringing disputes under control.

A fresh evaluation of the sources of disputes and strategy for addressing them can yield new – and sometimes faster or less expensive – paths to resolution.

If, the primary causes of the disputes are external to one's organisation – for example, a change in a counter-party's liquidity or in regulatory enforcement practices – the disputes strategy needs to be retooled to reflect the new realities and a hard look taken at whether the current team needs to be supplemented to address them.

Or perhaps the cause is internal – maybe the team that was perfect for the project at the outset is not the right one for dealing with the confluence of particular issues that emerged – then it is likely that both the disputes strategy and execution team need to be changed.

The need to be open to re-assembling the team to reduce and better manage disputes provides a good segue to the last – and one of the most important – basics that is key to avoiding and effectively managing disputes: remaining flexible.

#### **Remaining flexible**

Despite the best-laid plans, circumstances can and do change. Disputes that arise might be ones that require innovative thinking and a change in tack from the one originally planned. Keeping an open mind about disputes when they arise – and an unvarnished view of the reasons underlying them – can yield dividends when it comes to achieving a favourable outcome, be that revision of the contract to reallocate risks between the parties, a fast settlement, or deliberate and well-managed progression through the formal dispute resolution process to arrive at an ultimate decision on liability, among others. ■